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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 115

GENERAL MOTORS CORPORATION,
Appellant,
v.
STATE OF WASHINGTON, ET AL.,
Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION OF AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE
and
BRIEF OF AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., AS AMICUS CURIAE

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Automobile Manufacturers Association, Inc., respectfully moves this court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorney for the appellant herein has been obtained, but the attorney for the appellee herein refused to consent to the filing of a brief by Automobile Manufacturers Association, Inc., as *amicus curiae*.

The applicant, Automobile Manufacturers Association, Inc., a non-profit trade association whose members manu-

facture and sell automotive vehicles in the United States, has an interest in this case in that several of its members have been assessed a tax on wholesaling activities by the State of Washington. The assessed tax on these members is not being paid pending a final decision of the instant case, because their liability depends on a determination of the questions which are presented for decision in the instant case, namely, those set forth in appellant's Jurisdictional Statement.

Automobile Manufacturers Association, Inc., believes that appellant herein will be unable to give a full presentation of facts in the instant case. The Automobile Manufacturers Association, Inc., is in possession of factual information relating to the impact of the challenged tax on the automobile industry. This information cannot be presented by appellant, and it will be unknown to the Court unless presented by Automobile Manufacturers Association, Inc., as *amicus curiae*. It is desirable that the Court have these facts before them in considering the Jurisdictional Statement filed herein by appellant, because these facts demonstrate in part the scope of the issues and their importance both in the State of Washington and nationally.

Respectfully submitted,

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BRIEF OF AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., AS AMICUS CURIAE

THE ISSUE

The issue in this case is whether the State of Washington has applied its tax on wholesaling activities in a manner which violates the Commerce Clause (Art. 1, §8, cl. 3) and the Due Process Clause (Amend. XIV, §1) of the United States Constitution. The Supreme Court of Washington has held, in essence, that the tax may be applied on the

privilege of having customers within Washington. The *amicus curiae* believes that the Court did not properly consider that the tax is imposed on interstate sales, causes multiple taxation, and discriminates in favor of industry within the state.

INTEREST OF AMICUS CURIAE

Automobile Manufacturers Association, Inc., is a non-profit membership corporation organized under the laws of New York. The Association is composed of thirteen members, who are the manufacturers of well over 90% of all passenger automobiles, trucks, and busses produced in the United States. The members are:

> American Motors Corporation, Checker Motors Corporation, Chrysler Corporation, Divco Truck Division of Divco-Wayne Corporation, Duplex Division of Warner and Swasey Company, Ford Motor Company, General Motors Corporation, International Harvester Company, Kaiser Jeep Corporation, Mack Trucks, Inc., Studebaker Corporation, Walter Motor Truck Company, and White Motor Company.

The members of the Association are of varying size; however, all engage in sales in interstate commerce. Most sell their products nationally, including sales to dealers within the State of Washington. These companies do not have offices in every state; some do not have an office in Washington; no member has a manufacturing plant in Washington. Nevertheless, in order to meet the keen competition in the industry, these members must maintain personal contact with the dealers to whom they wholesale their products. They also must create a retail demand for their

products through national advertising media such as magazines, radio, and television.

Because of the nature of their activities, some members have been assessed the Washington wholesaler's tax on sales which they and the Association believe to have been in interstate commerce. If other states or local units of government were to enact and enforce tax laws in the same manner that Washington has, then all members would be exposed to tax on their interstate sales. There is also the likelihood of several states taxing the same interstate sale. The *amicus curiae* is vitally interested in ascertaining whether states have the power to tax in the manner that the State of Washington has taxed General Motors. The final decision in this case will affect the welfare of the automobile industry and all other industries engaged in interstate commerce. It is for this reason the Association believes that that final decision should be made by the Supreme Court of the United States, rather than by the Supreme Court of Washington.

IMPORTANCE OF THE DECISION IN THIS CASE

The final decision in this case will be of importance for two reasons. First, if the decision of the Supreme Court of Washington stands, it will make serious inroads on the right of merchandise to flow in interstate commerce without interference from the separate states. Second, if the decision stands, the business of the members of the *amicus curiae* will be seriously affected. This latter proposition will be discussed in this section, the former in the succeeding section.

Some members of the *amicus curiae* do not have an office within the State of Washington. Others during some periods in the last decade have not had an office within Washington.

Yet during these years Washington has assessed the disputed tax on these members' wholesaling activities, which were unrelated to an office within the state. Present assessments are now in excess of $1,200,000.00. With the tax assessments projected through December 31, 1962, the members will be liable for total sums in excess of $4,400,000.00. The taxes assessed and to be assessed directly affect the business of the members of the *amicus curiae* because they will have to absorb the tax, since the transactions involved have been completed. It is now impossible for the tax to be passed on to the members' customers even if that were legally permissible in the face of §82.04.500, Rev. Code Wash. It is the belief of the *amicus curiae* that these are proceeds from interstate commerce.

The magnitude of these sums which may have to be paid to the State of Washington indicates the immediate impact which the final decision in this case will have. However, the ultimate effect of a decision is far more significant.

Data for 1962 (or for the most recent fiscal year of a member) show that the members of the *amicus curiae* have annual gross receipts in excess of $22,500,000,000.00. Most members have customers in every state, but in many of the fifty states, one or more of these members have no office, plant, or other place of business. If in each such state these members had to pay a wholesale tax similar to the disputed tax, then the multitude of such taxes (at both state and local levels), coupled with taxes imposed on the same gross receipts by the states in which the products are manufactured, would subject interstate commerce to an unbearable burden.

For these reasons, the questions in this case present issues of so broad a scope and of such national importance that they must one day be decided by the Supreme Court

of the United States. It is the belief of *amicus curiae* that the issues are presently of such consequence that the Supreme Court should not defer its decision of these questions.

ARGUMENT

Under the Articles of Confederation each state could regulate foreign, interstate, and intrastate commerce. Because of this power, states enacted laws laying tariffs on goods coming from sister states. See, *e.g.*, N. Y. Laws 1787, ch. 81; N. Y. Laws 1785, ch. 7. The Commerce Clause of the Constitution was designed to bring an end to state control of foreign and interstate commerce. THE FEDERALIST, No. 42 (Madison).

The states were left with the right to regulate intrastate commerce and, therefore, the right to tax it. The states also have the power to regulate local incidents of interstate commerce. The *amicus curiae* believes that the Washington tax challenged in this case goes beyond that power, that the tax is equivalent to a tariff forbidden by the United States Constituton.

Since the tax involved here is on the privilege of making sales at wholesale, the Supreme Court of Washington, by finding appellant liable, decided that the sales took place within Washington. This determination was justified by pointing to the activities of appellant's agents within the state and to the presence of appellant's customers in the state. The tax is on unapportioned gross receipts, and no credit is given for taxes paid in other states. However, the court disregarded the possibility of multiple taxation.

Taxes in other states were distinguished because they were on the privilege of manufacturing rather than the privilege of wholesaling.

The court did not discuss the possibility of double taxation on wholesaling activities, but that possibility does exist. Appellant had a sales office in Portland, Oregon. At these, and other offices outside the state, orders were accepted and deliveries were made. These activities have traditionally fixed the point of "sale." If Oregon enacted a tax on sales at wholesale, then it could collect that tax from the "sales" at Portland. In cases where the sales involved Washington dealers, the conclusions would be: (1) Appellant would have to pay taxes to two states on the same sale. (2) Since both taxes would be applicable, the sale must have occurred in both states. The second conclusion offends logic; both conclusions offend the Commerce Clause.

Nor does the *amicus curiae* agree with the Supreme Court of Washington that wholesaling is an incident of business distinct from manufacturing. Appellant only manufactures goods to sell them. One activity cannot exist without the other. The Washington legislature recognized this when it provided that a Washington manufacturer did not have to pay both a manufacturer's tax and a wholesaler's tax. Rev. Code Wash. §82.04.440. It can thus be seen that not only could appellant be liable for two or more taxes on the same wholesaling activity, but also an additional tax on manufacturing the product involved. These unapportioned taxes are all in effect taxes on the privilege of having gross receipts.

This case presents additional questions whether the tax discriminates in favor of Washington manufacturers in

violation of the Commerce Clause and whether it violates the Due Process Clause.

These questions of substantial constitutional importance require the answer of the Supreme Court of the United States so that both industry and state courts can be certain of the extent of state taxing power.

CONCLUSION

This appeal ostensibly involves only the tax enforced by the State of Washington. But if that tax remains unchallenged, forty-nine other states, and innumerable local units with power to tax, are at liberty to erect their own trade barriers. This eruption of taxes would bury interstate commerce. Fifty states could act as independent nations in preserving their home industry.

When James Madison in THE FEDERALIST, No. 42, urged the necessity of the Commerce Clause, he pointed out that other federations (Switzerland and the Holy Roman Empire) forbade duties on commerce between member states. The present era is not devoid of apt analogies. In Europe the Common Market has been created to assist the free flow of commerce. Similar free-trade agreements have been suggested for other parts of the world.

The free flow of commerce has proved a vital force in this nation's economy. Certainly against the background of world progress in establishing free trade areas, the United States must preserve the integrity of the Commerce Clause of its Constitution. The Supreme Court,

the proper forum for that preservation, should accept the appeal in this case.

Respectfully submitted,

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Dated: May 2, 1963.